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THE FLOATING ZONE: LEGAL STATUS AND APPLICATION TO GASOLINE STATIONS†

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A relatively new concept in zoning which has been receiving a considerable amount of attention from the courts and from professional planners is that of the floating zone or the unlocated use district. What makes this concept

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of particular interest and controversy is its departure from the traditional ideas of zoning which have gained wide acceptance since the decision in *Euclid v. Ambler Realty Co.*,¹ which upheld zoning as a proper exercise of the police power. Following the *Euclid* decision, the pattern of zoning ordinances throughout the country has been to regulate land use, building

height and lot area by dividing governmental units into territorial districts with fixed boundaries. Often, because of peculiar circumstances, the literal application of an ordinance results in practical difficulty or unnecessary hardship. In such cases, zoning boards are empowered to grant variances from the strict letter of the ordinance involved. Further flexibility in the administration of a zoning ordinance has been accomplished by way of special exceptions or special use permits. Such exceptions are granted for specified uses in designated zones upon compliance with standards set out in the ordinance for each of such uses. The basic theory underlying such ordinances is that the boundaries of all districts are fixed either by maps or metes and bounds descriptions, so that property owners or prospective purchasers know exactly how their properties are classified for zoning purposes.

The device of the floating zone, which has also been referred to as the sinking zone or delayed zoning or two-step zoning, introduces an entirely new concept in that the location of such a zone is not initially fixed. This technique is employed to create a particular type of use district which at the time is not geographically delineated, but which can be subsequently located by petition of a property owner desiring to develop his tract for a particular use.

† Based on a paper presented at the Petroleum Industry Marketing Attorneys' meeting, Chicago, Illinois, August, 1963.

Such a zone floats over the entire governmental unit in no definite position until it is brought down to earth by a rezoning amendment which fixes its boundaries. Ironically, this new concept in land planning is in a sense anomalous with planning, since the governmental planning body no longer takes the initiative in planning land development, but permits the plan to be patterned by petitioning property owners.

It is the purpose of this article to consider the legal aspects of the floating zone device, the views of planners on the subject, and the applicability of the concept to the gasoline service station use. There has been a growing tendency to employ this zoning method for locating shopping centers, large-scale apartment developments, and even gasoline service stations, despite the conflict of authority on its legal status. Therefore, the question of the legality of this device is one of real interest to zoning practitioners generally, as well as to marketing attorneys of petroleum companies.

RODGERS V. TARRYTOWN

A leading case on the floating zone, and perhaps the earliest, is that of *Rodgers v. Village of Tarrytown*.² This case involved the validity of an ordinance and an implementing amendment of a suburban area near New York City. The 1947 ordinance created a new class of residential zone designated as "Residence B-B" for multiple family garden-type apartments. The 1948 amendment rezoned certain property over ten acres, on application of its owner, from a Residence A district for single family dwellings to the new Residence B-B district. The 1947 ordinance setting up this floating zone contained strict limitations as to a minimum lot size of ten acres, setbacks, and spacing of buildings. It also provided the mechanics to fix the boundaries of such district by the Village Board through the process of amendment to the zoning map on application of a property owner.

The fundamental question involved in the *Tarrytown* case was that of compliance with the state enabling act's requirements that the regulation be "in accordance with a comprehensive plan",³ and that the division of the Village into districts "be of such number, shape and area as may be deemed best suited."⁴ The prevailing opinion failed to explain what "a comprehensive plan" was. In this connection, it was pointed out merely that the creation of the new zone was justified by the need for additional housing facilities for young families to prevent their moving elsewhere, the desire to alleviate the tax burden on small home owners, etc. The major-

¹ 272 U.S. 365 (1926).

² 302 N.Y. 115, 96 N.E.2d 731 (1951).

³ N. Y. VILLAGE LAW § 177.

⁴ N. Y. VILLAGE LAW § 176.

ity held that the amendments, "read together as they must be",⁵ satisfied the statutory requirements.⁶

On the other hand, the minority of the court took the view that the Village Board did not have any "plan, comprehensive or otherwise,"⁷ and that the procedure employed, since it eliminated board initiative, was the very opposite of "comprehensive planning by the board."⁸ Moreover, the dissent argued that the 1947 amendment was defective for failure to comply with the requirement of the Village Law as to district divisions, in that establishment of zoning boundaries was implicit in such requirement.⁹

The prevailing opinion attempted to justify the floating zone device on the basis of similarities with that of the special exception. The latter type of use, sometimes referred to as a special permit use or a conditional use, is one which the legislative body finds to be generally compatible with other uses permitted in a particular zoning district, but not at every location therein nor under all circumstances. Accordingly, a special exception ordinance affords flexibility to a zoning pattern by permitting a certain use conditionally, the condition being that the dispensing agency determine compliance with specified standards which are tailored to fit the special problems which the use presents. Oddly enough, the prevailing opinion did not refer to the special exception technique by name, but instead repeatedly cited a case involving this device, *Nappi v. LaGuardia*.¹⁰ In *Nappi*, there was upheld an amendment to the New York City zoning ordinance. This amendment added by way of a special exception, to the uses permitted as of right in a residential district, one for administrative offices and industrial laboratory projects if subsequently approved on the basis of prescribed standards.

⁵ 302 N. Y. at 125, 96 N.E.2d at 736 (1951).

⁶ Recently quoted and followed in *Rogers v. North American Phillips Co.*, 37 Misc.2d 923, 928, 236 N.Y.S.2d 744, 751 (1962), *aff'd* 19 App.Div.2d 838, 245 N.Y.S.2d 995 (Sup. Ct. 1963). That case involved dismissal of a complaint which challenged the validity of rezoning of a 74-acre parcel from residential to a new floating zone designated "Planned Office Building and Research Laboratory District."

⁷ 302 N.Y. at 128, 96 N.E.2d at 737.

⁸ *Ibid.*

⁹ Referring to § 176 of the Village Law, the court minority said at 302 N.Y. 127, 96 N.E.2d at 737 (1951), that: "The plain import of that language is that after the board has exercised its power to 'divide the village into districts,' there should result a number of physically ascertainable districts, each having a definite 'shape' and 'area'. Obviously, the board of trustees, in enacting the 1947 ordinance, did not 'divide' the village into districts; the board merely assigned a name or title to a district which might some day be created. As a result of that ordinance, no one could tell whether there would ever be any 'Residence B-B Districts', or, if so, what their number, shape and area might be. Thus, the reference in the ordinance to 'districts' or 'zones' is meaningless, for it is impossible to have a true 'district' or 'zone' without specified boundaries."

¹⁰ 184 Misc. 775, 55 N.Y.S.2d 80 (1944), *aff'd* 269 App.Div. 693, 54 N.Y.S.2d 722 (1945), *aff'd* 295 N.Y. 652, 64 N.E.2d 716 (1945).

The prevailing opinion in *Tarrytown* "conceded that, under the method which the board did adopt, no one will know, from the 1947 ordinance itself, precisely where a Residence B-B district will ultimately be located."¹¹ The court majority then argued that the "same uncertainty"¹² would have been present if the *Nappi* type of ordinance had been enacted in the Village of Tarrytown "and yet there would be no doubt as to the propriety of that procedure."¹³ Rejecting this comparison, the dissent distinguished the *Tarrytown* case from *Nappi* in that:

"A person purchasing property in New York City in the designated residence district would be on notice that the additional use was authorized. He may examine the zoning ordinance and discover, with certainty, all the permitted uses to which the adjoining property could be put. On the contrary, a person purchasing property in Tarrytown in a Residence A or B district to bring up his children now has no way of knowing whether the property next to his may or may not become the site of a multiple family dwelling with the attendant increases in population, traffic dangers, commerce and congestion."¹⁴

As further justification for upholding the *Tarrytown* ordinance, despite its failure to afford notice to property owners of the precise location of the new zoning district, the court majority referred to the nature of the use involved there, saying: "But since such a district is simply a garden apartment development, we find nothing unusual or improper in that circumstance."¹⁵ Such reasoning is not sound, since judicial acceptance of the floating zone concept in the case of the innocuous use may furnish a legal precedent for acceptance of other uses more objectionable. This could lead to erosion of the sound principles of zoning regardless of the effect of the implementation of the concept in the case involved.

A more fundamental criticism of the *Tarrytown* decision is the failure of the prevailing opinion to give consideration and effect to the essential difference between the nature of the floating zone and that of the special exception as represented by the *Nappi* case. As previously noted, the latter type of ordinance adds to the uses already permitted a conditional one in all zoning districts of the same classification, thereby making such use conditionally available to all property owners in that type of district. Neither the ordinance creating the special exception nor implementation thereof entails any change of zoning classification. On the other hand, the floating zone ordinance awaits applications by property owners throughout the entire governmental unit, regardless of the zone

¹¹ 302 N.Y. at 126, 96 N.E.2d at 736.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Id.* at 130, 96 N.E.2d at 738.

¹⁵ *Id.* at 126, 96 N.E.2d at 736.

in which the property is located, for rezoning from one classification to another. Since implementation of the floating zone ordinance requires a zoning change, it often raises the question of spot zoning, particularly where small parcels are involved.

This basic dissimilarity between a special exception and rezoning, as well as the danger of spot zoning inherent in the latter, is demonstrated in the very case of *Nappi v. LaGuardia*, so frequently referred to in the prevailing opinion in *Tarrytown*. It appears from the cited opinion that, at the time of the enactment of the amendment authorizing the special exception, objections were voiced with respect to the general effect of the amendment rather than with reference to the defendant's project in particular. That court, per Froessel, J., indicated that if the city had tried to confine the proposed use merely to defendant's property, by way of a rezoning amendment, such an attempt would have constituted spot zoning. The court said:

"The minutes of the hearing before the Planning Commission and the Board of Estimate clearly demonstrate that this amendment was intended by the municipal authorities to be city-wide in scope, and many of those who appeared and objected based their objections not upon the defendant's project but upon the very fact that the amendment would permit such projects on plots of ten acres or more. In other words, some of the objectors would have countenanced 'spot zoning,' but the municipal authorities did not. Instead, they adopted a general amendment which does not permit in one residential district that which is not permitted in another. All such districts became subject to the use contemplated by the amendment, if the procedure therein be followed."¹⁶

Spot zoning has been explained "as the practice whereby a single lot or area is granted privileges which are not granted or extended to other land in the vicinity in the same use district."¹⁷ The charge of spot zoning leveled at the *Tarrytown* ordinance was held to be without substance on the ground that the ordinance was in accordance with a comprehensive plan. The prevailing opinion pointed out that if an ordinance is enacted in accordance with a comprehensive plan, it is not spot zoning even if it "creates in the center of a large zone small areas or districts devoted to a different use."¹⁸ By coincidence, both the *Tarrytown* and *Nappi* ordinances required ten acres as a minimum plot.¹⁹ While the *Nappi* case upheld the special exception ordinance, the above quoted dictum of the lower court clearly indicated that rezoning of the defendant's property would have constituted spot zoning. Surely the rezoning

¹⁶ 184 Misc. at 780, 55 N.Y.S.2d at 85.

¹⁷ 1 RATHKOFF, LAW OF ZONING AND PLANNING, § 26-1 (3d ed. 1962).

¹⁸ 302 N.Y. at 124, 96 N.E.2d at 735.

¹⁹ Here again, the court majority in *Tarrytown* cited the *Nappi* decision as authority that such a minimum "was well within the range of unassailable legislative judgment." 302 N.Y. at 123, 96 N.E.2d at 734.

hypothesized in the dictum of the *Nappi* case, involving the New York City zoning ordinance, would have been as much in accordance with a comprehensive plan as the rezoning ordinance in the *Tarrytown* case. The holding of the *Tarrytown* decision in this respect is not only contrary to the dictum of *Nappi*, but is illogical because the essential difference between the two methods does not permit parallelism. It is difficult to conceive how a charge of spot zoning can be sustained with respect to a special exception ordinance, regardless of the size of the parcel concerned, since no change of zoning is involved, and since the very framework of the ordinance "does not permit in one . . . district that which is not permitted in another (of the same classification)."²⁰ Theoretically at least, all subject properties and all affected properties within similar zoning districts are dealt with on an even basis in the case of a special exception, but this would not necessarily be so in the case of rezoning under a floating zone ordinance. Indeed, as in the case of a variance, a special exception is commonly granted for a small parcel, whereas the rezoning of small parcels often collides with the challenge of spot zoning.²¹ The court in *Tarrytown* failed to recognize this distinction.

A further reason why a reclassification of zone is not analogous to the granting of a special exception is that rezoning involves amendment of the zoning map and is a legislative act while the granting of a special exception is administrative or quasi-judicial. Because of the strong presumption of validity of legislative acts, the courts are much more reluctant to upset rezoning than to reverse administrative decisions in special exception cases. Accordingly, there is far less likelihood of judicial upset of rezoning granted on the basis of favor than there is of judicial upset of a special exception granted on that basis. The distinction between a special exception and rezoning is even more pointed in the event of a denial of the application. A denial of a special exception is subject to court review, but the applicant is without any realistic relief in the event of a refusal to legislate by way of rezoning.

The lack of availability of customary judicial review of a refusal to rezone is an extremely important point which has been clearly demonstrated by a New York court decision last year. The case is *California Oil Co. v. Root*,²² involving an ordinance of the Town of Salina, New York. The zoning ordinance created a special

²⁰ 184 Misc. at 780, 55 N.Y.S.2d at 85.

²¹ Although the size of the parcel involved is not the only consideration, it is an important one. See *Spot Zoning and the Comprehensive Plan*, 10 SYRACUSE L. REV. 303, 305 (1958): "While the courts are quick to state that the size of the plot alone is not sufficient to invalidate an ordinance, an examination of the cases shows that the size of the new zone is the most important single factor in determining whether a comprehensive plan has been followed. There is a direct relation between the dimensions of the amended area and the validity of the ordinance." See also, 15 OKLA. L. REV. 197, 198 (1962).

²² 18 App.Div.2d 873, *appeal denied*, 12 N.Y.2d 647, 238 N.Y.S.2d 1027 (1963).

Commercial B District where a gasoline filling station was permitted on approval of the Board of Appeals, but the only parcels of land so zoned were existing service station locations. After the Town Board denied petitioners' application to rezone certain property from Residential A to the Commercial B District, they instituted a proceeding to review the Town Board's denial under Article 78 of the New York Civil Practice Act. This proceeding, which is in the nature of certiorari, is the customary method of obtaining judicial review of administrative or quasi-judicial determinations in New York.²³ It was contended that the action of the Town Board in granting or denying an application for change of zone to Commercial B District was equivalent to the granting or denial of a special exception. The validity of the ordinance was not in issue. The lower court dismissed the petition on the ground that it appeared on the face thereof that the denial was legislative in nature and, therefore, not reviewable in an Article 78 proceeding. The Appellate Division, Fourth Department, unanimously affirmed and thereafter the New York Court of Appeals denied leave to appeal to that court.²⁴ As we have seen, the New York court in *Tarrytown* upheld the floating zone provision by implying a parallel with a special exception. Now we have the same court in the *California Oil Company* case treating a denial of such rezoning differently from a denial of a special exception. It would appear, therefore, that a basic fallacy of the *Tarrytown* decision was the majority's reliance on the entirely distinguishable special exception device in upholding the floating zone legislation.

PLANNERS' CRITICISM OF TARRYTOWN

The decision in the *Tarrytown* case evoked a great deal of adverse criticism on the part of professional planners. Pending

²³ Since September 1, 1963, the New York Civil Practice Act and Rules of Civil Practice have been replaced by the Civil Practice Law and Rules. A proceeding in the nature of certiorari against a public body or officer, formerly under Article 78 of the Civil Practice Act, is retained under article 78 of the Civil Practice Law and Rules.

²⁴ Cf. *Rothstein v. County Operating Corp.*, 6 N.Y.2d 728, 158 N.E.2d 507, and *Lemir Realty Corp. v. Larkin*, 11 N.Y.2d 20, 181 N.E.2d 407. In the latter case, the New York Court of Appeals held that "special exceptions grants or denials, even though by a legislative body, were for court review purposes administrative" and therefore subject to review in an article 78 proceeding; but see the *Tarrytown* case, 302 N.Y. at 123, 96 N.E.2d at 734: "And—while no such question is here presented—we note that the (town) board may not arbitrarily or unreasonably deny applications of other owners for permission to construct garden apartments on their properties. The action of the (town) board must in all cases be reasonable and, whether a particular application be granted or denied, recourse may be had to the courts to correct an arbitrary or capricious determination. *E.g.*, *Nappi v. LaGuardia*, 184 Misc. 775, 781, 55 N.Y.S.2d 80, 86, *aff'd* 269 App.Div. 693, 54 N.Y.S.2d 722, *aff'd* 295 N.Y. 652, 64 N.E.2d 716; *Green Point Sav. Bank v. Board of Zoning Appeals*, 281 N.Y. 534, 24 N.E.2d 319" and other cases. It is noteworthy that while the *Nappi* case was an action for declaratory judgment, that of *Green Point Savings Bank* was an article 78 proceeding.

appeal of that case, the Regional Plan Association (of New York) submitted a brief *amicus curiae* in which it argued:

"Under the decision appealed from herein, public officials may grant to owners the right to be relieved of zoning restrictions, not because the proposed change conforms to statutory standards but because such owners deem release from existing restrictions to be in their private interest and public officials believe the change will bring more tax revenue into the public treasury If this is to be the law, zoning will cease to be a protective measure for the benefit of all and will become a happy hunting ground for official favor."

The comment of the American Society of Planning Officials was less restrained. In their publication, *Zoning Digest*, they referred to the *Tarrytown* decision as "The Neatest Trick of The Month,"²⁵ and urged that it was bad law which might lead to the demoralization of zoning not only in New York State but throughout the country. After commenting that the legislation approved by the *Tarrytown* decision was anomalous with comprehensive planning and constituted "spot zoning, whether the Court of Appeals said so or not,"²⁶ the planners concluded:

". . . This leads to the rule of man, rather than the rule of law. The unfortunate aspect of the whole business is that an unscrupulous board of trustees or planning body now has an authorized method of establishing spot zones; an authorized method through a subterfuge of evading the legal and judicial limitations on the granting of variances."²⁷

HUFF V. BOARD OF ZONING APPEALS

The decision of the New York court in the *Tarrytown* case was cited with approval by a majority of the Maryland Court of Appeals in the case of *Huff v. Board of Zoning Appeals*.²⁸ In the latter case, the Commissioners of Baltimore County adopted new county-wide zoning regulations providing for a zoning classification designated "M.R.—Manufacturing, Restricted."²⁹ This M.R. district was to be subsequently located by the Zoning Commissioner, rather than by the legislative body as in the *Tarrytown* case, on petition of a property owner and after an advisory report of the Planning Commission. To be eligible for such a classification, the property had to be at least five acres in area. Further requirements were provided as to height, off-street parking, etc. The purpose of the requested change to the M.R. classification of an eighteen-acre tract of farm land in a residence zone where only one and two-family homes were permitted, was to permit the location of a plant for the manufacture and assembly of precision instruments for the

²⁵ 3 ZONING DIGEST 33 (1951).

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ 214 Md. 48, 133 A.2d 83 (1957).

²⁹ *Id.* at 52, 133 A.2d at 85.

federal government. Such relocation to a rural area was sought to conform to federal requirements for decentralizing plants engaged in making products vital to defense. Reclassification by the Zoning Commissioner was upheld by a divided court of the Maryland Court of Appeals. The majority referred to a comprehensive plan as a "general plan,"³⁰ and pointed out that the language of the *Tarrytown* opinion relating to court review of action of the village board there,³¹ was particularly applicable to "the discretion of the administrative body"³² in the *Huff* case. However, the majority of the court in the Maryland case rested the decision on the express ground that the reclassification granted by the Zoning Commissioner was analogous to the granting of a special exception.³³

The prevailing opinion of the Maryland court upheld, as being in accordance with a comprehensive plan, an ordinance which established a new zoning district although lacking simultaneous delineation of its boundaries. To that extent this decision has been cited in support of the floating zone concept. However, the rezoning there was accomplished by an administrative agency, rather than by a legislative body which usually exercises the function of amending the zoning map. The majority of the court treated alike zoning reclassification by an administrative agency and the granting of a special exception by such an agency. Since the floating zone concept entails rezoning, which is a legislative act, the *Huff* case, with an administrative dispensing agency, does not support the floating zone principle in its entirety. On the other hand, vesting an administrative agency with power of amending the zoning map by reclassification of zones would appear to be an illegal delegation of legislative power by the County Commissioners as well as an unsound practice from a zoning point of view.³⁴

³⁰ *Id.* at 58, 133 A.2d at 89.

³¹ See note 24 *Supra*.

³² 214 Md. at 64, 133 A.2d at 92.

³³ Although subsequent Maryland rezoning cases do not deal with the floating zone concept, it is interesting to note how differently the special exception analogy of the *Huff* case has been treated. In *Board of Zoning Appeals v. Bailey*, 216 Md. 536, 141 A.2d 502 (1958), the same court refused to apply the analogy to permit the use of a six-acre tract in a rural area for a trailer park, saying that the *Huff* case was "exceptional." In *Carole Highlands Citizens Ass'n v. County Comm'rs*, 222 Md. 44, 158 A.2d 663 (1960), the court brushed aside appellant's attempt to support the reclassification as falling within the category of a special exception, saying "The short answer to this contention would seem to be that the proceeding was not based on an application for special exception, but was for rezoning." In the later case of *Costello v. Sieling*, 223 Md. 24, 161 A.2d 824 (1960), the Maryland court accepted the analogy to permit a trailer park in a residential district on the basis of compatability of uses, but still later in *Overton v. County Comm'rs*, 223 Md. 141, 162 A.2d 457 (1960), the same court rejected the special exception analogy on the ground of incompatibility of a three-story building with shops and medical offices, in connection with a home for elderly, in an area previously zoned residential.

³⁴ See BASSETT, ZONING 166 (2d ed. 1940).

EVES V. ZONING BOARD

The leading case striking down the floating zone principle is that of *Eves v. Zoning Board of Lower Gwynedd Township*.³⁵ It involved property just beyond the outer limits of metropolitan Philadelphia. The Supervisors of the Township adopted an ordinance which amended the general zoning ordinance by providing for an unlocated zone designated as "F-1 Limited Industrial."³⁶ As in the Maryland *Huff* case, this zone was created for light industry with restrictions as to architecture, setbacks, landscaping, buffer strips to protect adjoining areas, and a minimum lot size—in this case, twenty five acres. The amendment also provided a procedure for reclassification by the Supervisors on application of a property owner and a report from the Planning Commission. Following an application for rezoning so as to permit the construction of an industrial and sewage treatment plant covering a 103-acre tract in a residential zone, the Supervisors adopted a second ordinance which rezoned the property to the requested F-1 classification but reduced the area from 103 to 86 acres. The adjoining residential property owners challenged the validity of the two acts on the ground of failure to conform to the state's enabling legislation. The Supreme Court of Pennsylvania unanimously agreed with the petitioners and annulled the building permit.

Although the court did not cite either the *Tarrytown* case of New York or the *Huff* case of Maryland, its rationale in some respects followed the reasoning of the dissenting opinions in these two earlier cases. It was noted that the Supervisors were required by the state enabling legislation to "implement a comprehensive plan by enacting zoning regulations in accordance therewith" and "to shape the land uses into districts of such number, shape and area as may be deemed best suited to carry out the purpose of this article."³⁷ The court pointed out that the Supervisors had confused "comprehensive planning" with "a comprehensive plan," and said:

"The adoption of a procedure whereby it is decided which areas of land will eventually be zoned 'F-1' Limited Industrial Districts on a case by case basis patently admits that at the point of enactment of ordinance 28 (the floating zone ordinance involved) there was no orderly plan of particular land use for the community. Final determination under such a scheme would expressly await solicitation by individual land-owners, thus making the planned land use of the community dependent upon its development. In other words, the development itself would become the plan, which is manifestly the antithesis of zoning 'in accordance with a comprehensive plan'."³⁸

³⁵ 401 Pa. 211, 164 A.2d 7 (1960).

³⁶ *Id.* at 213, 164 A.2d at 8.

³⁷ *Id.* at 216, 164 A.2d at 10.

³⁸ *Id.* at 217, 164 A.2d at 11.

The Pennsylvania court's rejection of the floating zone concept was based primarily on the statutory objection that the procedure was not in consonance with a comprehensive plan. Also, in considering the device from a zoning point of view, the opinion elaborated on certain secondary evils of this technique:

"Several secondary evils of such a scheme are cogently advanced by counsel for the appellants. It would produce situations in which the personal predilections of the supervisors or the affluence or political power of the applicant would have a greater part in determining rezoning applications than the suitability of the land for a particular use from an overall community point of view. Further, while it may not be readily apparent with a minimum acreage requirement of 25 acres, 'flexible selective zoning' carries evils akin to 'spot zoning', for in theory it allows piecemeal placement of relatively small acreage areas in differently zoned districts. Finally, because of the absence of a simultaneous delineation of the boundaries of the new 'F-1' district, no notice of the true nature of his vicinity or its limitations is afforded the property owner or the prospective property owner. While it is undoubtedly true that a property owner has no vested interest in an existing zoning map and, accordingly, is always subject to the possibility of a rezoning without notice, the zoning ordinance and its accompanying zoning maps should nevertheless at any given time reflect the current planned use of the community's land so as to afford as much notice as possible."³⁹

Particularly noteworthy was the Pennsylvania court's comparison of the floating zone and the special exception, as techniques in zoning. We have already seen that the differences between these two devices are rooted in the philosophies, dispensing agencies, and the standards of court review involved. Elaborating further on these differences, the court noted that under the enabling legislation "only the specialized township board of adjustment was empowered to permit deviations from the prevailing zoning regulations on a case by case basis"⁴⁰—by way of variances and special exceptions—and according to the standards spelled out by the local legislature. However, in the case of the floating zone ordinance, the very legislative body that established the standards would determine compliance therewith. In this connection, it was noted that the legislative body would not be bound by "rigid statutory standards . . . as in the case of special exceptions."⁴¹ The court apparently meant that the local legislature, in implementing a floating zone ordinance, could change the standards it established. Another difference stressed by the court was the "close

³⁹ *Id.* at 217, 164 A.2d at 11.

⁴⁰ *Id.* at 219, 164 A.2d at 12.

⁴¹ *Id.* at 221, 164 A.2d at 12.

standard of court review in the very delicate area of protecting property rights,"⁴² which was applicable to the special exception but lacking with respect to the floating zone.

The decision of the Pennsylvania court in the *Eves* case received favorable comment in an article in the magazine, *The American City*.⁴³ Referring to the Pennsylvania court's ruling on the question of comprehensive planning as "one of the most important zoning decisions in recent years,"⁴⁴ the article concluded that the decision was "generally in line with the best in modern planning thought."⁴⁵

The conformity of the Pennsylvania court's conception of a comprehensive plan with modern planning ideas is also borne out by an often-cited law review article⁴⁶ which was written five years before the *Eves* decision. There, Professor Haar considered at great length the relationship between the zoning ordinance, and what he called "its parent, the overall city plan."⁴⁷ He explained the planner's view of this relationship thus:

"To the professional planner, the dependence of zoning upon planning is relatively simple and clear. The city master plan is a long-term, general outline of projected development; zoning is but one of the many tools which may be used to implement the plan. Warnings have constantly emanated from the planners that the two must not be confused. 'Instead of being itself the city plan, for which unfortunately it is often mistaken,' says one of the early standard works in the field, 'zoning is but one of the devices for giving effect to it.' And a recent text cautions: 'The danger is that it (zoning) may be considered a substitute for city planning and that, a zoning plan having been adopted, enthusiasm and interest may die out. Zoning is not a substitute for a city plan . . .'"⁴⁸

DONAHUE V. ZONING BOARD

Whatever confusion or dissension there was about the legal status of the floating zone concept after the *Eves* decision, it was assumed that such a provision was invalid, at least in the State of Pennsylvania. However, in the recent case of *Donahue v. Zoning*

⁴² *Ibid.*

⁴³ *The American City*, Feb. 1961, p. 151.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ Haar, *In Accordance With a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1156 (1955).

⁴⁷ *Id.* at 1154.

⁴⁸ *Id.* at 1156. To the same effect see *Fornaby v. Feriola*, 18 App.Div.2d 215, 219, 239 N.Y.S.2d 185, 189 (1963) where the court said: "A master plan is to be distinguished from a zoning ordinance. The former is 'a long term, general outline of projected development,' while the latter 'is but one of the many tools which may be used to implement the plan' (68 HARV. L. REV. 1156)." Cf. *Harr & Hering, Lower Gwynedd Township Case: Too Flexible Zoning or an Inflexible Judiciary?*, 74 HARV. L. REV. 1552, 1559 (1961)

Board of Whitemarsh Township,⁴⁹ decided in October 1963, the same Pennsylvania court took a contrary view with respect to substantially similar ordinances involving a different land use, an apartment house development. While the opinion does not indicate the size of the area involved, the record⁵⁰ discloses that the property consisted of thirty three acres.

The court distinguished the two cases on three points, none of which, it is submitted, has any legal merit. In the *Eves* case there was a lapse of less than ten months between the two enactments; whereas in the *Donahue* case less than six weeks intervened. On this basis, the court noted "(i)n the instant (*Donahue*) case, the new classification was established and the Zoning Map amended within a very short period of time"⁵¹ and proceeded to the same conclusion, reached by the New York court in the *Tarrytown* case, that "these ordinances should be read together as one enactment."⁵² Indeed, if the time span were important as bearing on the intent of the legislators, then *Eves* is stronger on this point than *Donahue* because the legislators in the former case enacted a rezoning ordinance (No. 28A) on the same day that the classification ordinance 28 was adopted. However, that earlier rezoning ordinance was held invalid because of a procedural irregularity.⁵³ This necessitated the second rezoning ordinance, the one attacked in the *Eves* case, which was enacted less than ten months after the first. Moreover, applying this time-span criterion, we would have a situation where floating zone ordinances would appear by their terms to be in effect, but as a matter of law they would have suffered demise because of failure of implementation within a period of time. Such uncertainty would result in chaos rather than stability of land uses and property investments.

Another distinction made in the *Donahue* case was that the ordinance creating the new classification did not, by its own terms, provide the mechanics whereby property owners could obtain rezoning to the new classification. Referring to this procedure in the *Eves* ordinance, the court said: "It was this case by case review which demonstrated the absence of a comprehensive plan."⁵⁴ True, in *Eves* the court noted that the adoption of such procedure "patently admits that at the point of enactment of ordinance 28

also *Higginbotham v. City of The Village*, 361 P.2d 191 (Okla. 1961), where the city zoning map and a comprehensive zoning ordinance were considered together to satisfy the statutory requirement of a comprehensive zoning plan.

⁴⁹ 412 Pa. 332, 194 A.2d 610 (1963).

⁵⁰ Brief for Appellants, p. 5a, *Donahue v. Zoning Board of Whitemarsh Township*, 412 Pa. 332, 194 A.2d 610 (1963).

⁵¹ 412 Pa. at 334, 194 A.2d at 611.

⁵² *Ibid.* In the *Tarrytown* case, a year and a half elapsed between the two enactments. This time span was mentioned by the court there to negate that there was spot zoning for defendant's benefit. 302 N.Y. at 124, 96 N.E.2d at 735.

⁵³ *Sisters of Mercy v. Lower Gwynedd Township*, 75 Montg. Co. L.R. 190.

⁵⁴ 412 Pa. at 334, 194 A.2d at 611.

there was no orderly plan of particular land use for the community."⁵⁵ However, the mere omission of such procedure from the terms of the challenged ordinance would seem to be of little, if any, significance because every property owner has the right to apply for rezoning whether or not the ordinance creating a new classification specifically affords him that right. As a matter of fact, the rezoning effected in the *Donahue* case was not initiated by the legislative body but resulted from the application of a property owner. Accordingly, all the evils of the floating zone, so forcefully pointed out by the court in *Eves*—the dangers of spot zoning, the opportunities for political or personal favors by an unscrupulous local legislature, unbridled by standard court review, the absence of notice to a property owner of the true nature of his vicinity or its limitations,—are all inherent in this type of ordinance whether or not the ordinance itself expressly provides for applications thereunder. In the *Donahue* case, the court attributed the evils of the *Eves* legislation to "the defects (which) were specifically created by the very terms of the ordinances" which set up the application procedure. However, in the next sentence the court acknowledged that "It is not unusual for a zoning change to be made on request of a landowner. . . ."⁵⁶ It is submitted that the court erroneously related the evils of the *Eves* legislation to the application procedure provided there, rather than to the essence of the floating zone concept itself since the omission from such legislation of provision for applications thereunder does not eliminate the evils of the floating zone.

The remaining distinction made by the Pennsylvania court was that, unlike the ordinance which it struck down in *Eves*, the ordinance which established the new zoning classification in the instant case was introduced by a declaration of intent. This introduction consisted merely of general statements of policy and pleasant-sounding clichés.⁵⁷ The appellants argued that the ordinances failed to comply with the definition of a "comprehensive plan" as contained in the Township's General Zoning Ordinance. They contended that what was required was a separate document outlining future goals in the nature of a master plan. The Pennsylvania court,

⁵⁵ 401 Pa. at 217, 164 A.2d at 11.

⁵⁶ 412 Pa. at 335, 194 A.2d at 611.

⁵⁷ "The purpose of establishing planned apartment districts shall be to encourage the logical and timely development of land for apartment purposes in accordance with the objectives, policies, and proposals of the (Comprehensive or General) Plan for the community; to permit a variety of housing to the landscape which conforms to the interest of the (Comprehensive or General) plan and zoning ordinance; to assure the suitable design of the apartment in order to protect the surrounding environment of adjacent and nearby neighborhoods; and to insure that the proposed development will constitute a residential environment of sustained desirability and stability and not produce a volume of traffic in excess of the capacity for which access streets are designed. The protective standards contained in this Article are intended to minimize any adverse effect of the apartment or nearby property values." 412 Pa. 332, 336, 194 A.2d 610, 612.

nevertheless, upheld the ordinances on the basis of the "comprehensive plan" which it said was embodied in the aforesaid declaration of intent, differentiating between such a plan and a master plan. By this distinction the court decided, in part, the question it posed in *Eves*, as to how far a comprehensive plan need go in containing the characteristics of a master plan.⁵⁸ Regardless of the extent to which a comprehensive plan is to be equated with a master plan, the gist of the *Eves* ruling was that since "the focus of any plan is land use,"⁵⁹ general policies had to be translated into specific proposals with "ultimate decision of selective land uses."⁶⁰ To use other language of that opinion, "the zoning ordinance and its accompanying zoning maps should . . . at any given time reflect the current planned use of the community's land so as to afford as much notice as possible."⁶¹ It was held in *Donahue* that the comprehensive plan mandated by the enabling legislation need not go so far as a master plan indicating *future* goals, but the court there failed to heed the requirement in *Eves* that consonance with a comprehensive plan meant, at least, fixation of *current* land use allocations.

In the *Donahue* case, the Pennsylvania court ignored its earlier pronouncements in *Eves*. It seems to have taken a different approach in determining conformity with a comprehensive plan, but without furnishing any new guidelines for such determination. The different judicial approach in each case may be attributed to the court's concern with the difference in the uses involved. In *Eves*, the court considered an industrial and sewage-treatment plan, in particular, and in general, the "piecemeal placement of relatively small acreage areas in differently zoned districts."⁶² In *Donahue*, the court was concerned with a large-scale apartment house development, just like the majority of the New York court in the *Tarrytown* case was concerned with the circumstance that what was there involved was "simply a garden apartment development."⁶³

⁵⁸ In *Eves*, the court said: "Just what the precise attributes of a comprehensive plan must be, or the extent to which the plan must approach a development plan for the township formulated by a planning commission should one exist is not now before us." The court noted that it was not clear to what extent the township had a development plan. 401 Pa. 211, 215, 164 A.2d 7, 10. But see Harr & Hering, *The Lower Gwynedd Township Case: Too Flexible Zoning or an Inflexible Judiciary?* 74 HARV. L. REV. 1552, 1559 (1961) where it was pointed out that other language of the court in the *Eves* case could be interpreted as requiring a written plan preceding enactment of the ordinance and that such a requirement, while welcome in that it would provide a sounder basis for judicial review, would raise practical objections in many communities lacking such a plan. See also, *The "New Look" in Pennsylvania Zoning—Planning Comes of Age*, 35 TEMP. L. Q. 59, 66 (1961).

⁵⁹ 401 Pa. at 216, 164 A.2d at 10.

⁶⁰ *Id.* at 219, 164 A.2d at 11.

⁶¹ *Id.* at 218, 164 A.2d at 11.

⁶² *Ibid.*

⁶³ 302 N.Y. at 126, 96 N.E.2d at 736.

While there may be merit for different requirements for different types of uses from a planning viewpoint, it is for the state legislatures, and not for the courts, to vary these requirements by defining "in accordance with a comprehensive plan" in enabling acts. As it now stands, we have sheer confusion, uncertainty, and instability arising from different constructions of the identical phrase by different courts and, indeed, by the same Pennsylvania court in the short period of three years which elapsed between the decisions in *Eves* and *Donahue*.

"FLOATING USE" CASES

Failure to comply with the statutory requirement of conformity with a comprehensive plan was also the basis for striking down a zoning ordinance by the New Jersey Supreme Court in *Rockhill v. Chesterfield Township*⁶⁴ decided even before *Eves*. This suit involved the validity of a zoning ordinance of a rural community where the entire area was reserved for residential and agricultural uses. The ordinance then provided for "special uses" consisting of neighborhood business, shopping centers, gasoline service stations, restaurants, light industrial uses, etc. The "special uses" were to be approved or disapproved by the governing body, pursuant to general standards, after a report of the Planning Commission. They were to be subsequently located *without reference to zoning districts*. Since no change of zoning was involved, the case dealt with what can be considered a "floating use" which hovered over the entire community, rather than a floating zone. The New Jersey court ruled the ordinance invalid as flouting the "essential concept of district zoning according to a comprehensive plan".⁶⁵ The court remarked that investments are made on the basis of knowledge of, and reliance on, district use classification, a classification that has some degree of permanency in that it will stand until changing conditions dictate otherwise.

A late case on this subject is *Summ v. Zoning Comm. of the Town of Ridgefield*.⁶⁶ An amendment of the ordinance there authorized the zoning commission to issue special permits for research laboratories *in any zone*, and prescribed detailed standards or requirements including a minimum tract size of 40 acres. Before anyone sought to implement the enactment by application for a special permit, the owners of residential property challenged the validity of the amendment, contending that it violated the principles of sound zoning by creating a floating zone. The Connecticut court acknowledged "the conflicts which have arisen in other jurisdictions over the authority to establish floating zones."⁶⁷ It mentioned the

⁶⁴ 23 N.J. 117, 128 A.2d 473 (1957).

⁶⁵ *Id.* at 127, 128 A.2d at 479.

⁶⁶ 150 Conn. 79, 186 A.2d 160 (1962).

⁶⁷ *Id.* at 90, 186 A.2d at 165. It seems rather peculiar that in listing floating zone cases the Connecticut court omitted *De Meo v. Zoning Commission*, 148 Conn. 68, 167 A.2d 454 (1961) and cited that case merely for the

Rockhill case of New Jersey in this connection and noted that "in all of the cited cases the court was considering an actual change in zone."⁶⁸ As appears above, however, the ordinance in the *Rockhill* case provided for special uses "without regard to districts,"⁶⁹ so that no change of zoning district was involved in that case either.

In distinguishing floating zone legislation, the Connecticut court pointed out that the amendment before it did not change any zoning boundaries but "merely adds to the list of permissible uses in any zone a new use — that of research and development laboratories. See *Nappi v. LaGuardia* . . ."⁷⁰ Insofar as no change of zoning was involved, the *Ridgefield* case was similar to the cited *Nappi* case, where a special exception was involved, and different from *Tarrytown* and the other floating zone cases. In this respect, the floating use device, partially resembling the special permit or special exception, eliminates some of the disadvantages of the floating zone. Because of the administrative nature of the former, judicial review in the nature of certiorari is available and there is less opportunity for personal or political partiality.

However, the special exception in *Nappi* was confined to a specified type of district in New York City, whereas the *Ridgefield* amendment applied to all districts of the town. Inherent in the *Ridgefield* legislation, therefore, was the same uncertainty, the same insufficiency of notice to present and prospective property owners, as is characteristic of floating zone legislation.

Moreover, the floating use concept upheld in *Ridgefield* does not appear to be consistent with the rationale of the special exception. We have seen that the latter device is predicated on a legislative determination of area homogeneity or general compatability of particular uses with others permitted as of right. But because these particular uses present special problems, harmony may not necessarily follow at every location and under all circumstances in certain types of zones. Accordingly, compatability is accomplished by having the dispensing agency determine compliance with prescribed standards which are specially adapted for the particular use in the type of zone involved. The floating use ignores district

general proposition that the courts will not substitute their discretion for that of zoning agencies. In the *De Meo* case, however, the same court had, in effect, approved the floating zone concept. Nowhere in that case is the ordinance denominated as one dealing with a floating zone, but the concept was involved there because a new garden apartment zone was created without any specific area being designated therefor on the zoning map. In upholding the rezoning to that classification of slightly more than four acres of vacant property previously devoted to a commercial non-conforming use, the Connecticut court equated the comprehensive plan with the zoning regulations, concluding that the rezoning was in harmony with such plan and therefore not spot zoning. However, the opinion there does not reflect any consideration of the floating zone concept or the cases dealing therewith.

⁶⁸ 150 Conn. at 90, 186 A.2d at 165.

⁶⁹ 23 N.J. at 127, 128 A.2d at 479.

⁷⁰ 150 Conn. at 90, 186 A.2d at 165.

zoning and its justification entails the premise that the particular use is generally similar to, or compatible with, all others throughout the entire community. Ordinarily at least, such a premise would appear to be unsound from a planning standpoint.

The plaintiffs in the *Ridgefield* case also contended that the amendment did not meet the statutory requirement that zoning be "in accordance with a comprehensive plan." The Connecticut court rejected this argument, holding that the comprehensive plan was "to be found in the scheme of the zoning regulations themselves"⁷¹ and that the amendment was therefore valid. Accordingly, on its facts the Connecticut *Ridgefield* case was similar to the New Jersey *Rockhill* case in that neither involved any change of zone. Nevertheless, the interpretations given by the courts to the phrase "in accordance with a comprehensive plan" were diametrically opposed with consequent contrary conclusions.

Reviewing briefly the court holdings in the above cases, we have the divided New York court upholding the floating zone concept in the *Tarrytown* case, and the divided Maryland court upholding the concept in the *Huff* case by an unwarranted analogy with a special exception; the unanimous Pennsylvania Supreme Court rejecting the floating zone concept in the *Eves* case, and later upholding the concept in *Donahue*. In addition, on the so-called "floating use" concept, the New Jersey court in the *Rockhill* case struck down the ordinance providing for special uses without regard to zoning districts. In contraposition, the Connecticut court in the *Ridgefield* case upheld the same type of ordinance.

PLANNERS' MODIFIED ATTITUDE

We have noted the adverse criticism by professional planners of the floating zone idea in the *Tarrytown* case, and their favorable comment concerning the rationale of the Pennsylvania court in the *Eves* case where the concept was rejected. However, since the *Tarrytown* decision, the planners seem to have withdrawn some of their opposition to implementation of the floating zone concept in certain exceptional cases involving large-scale developments in undeveloped areas. A cogent argument made in favor of the floating zone for large-scale projects is that immediate mapping would be self-defeating since the properties in the new zone would be increased in price or even taken off the market. If that happened it would be difficult, if not impossible, to assemble large areas. So far as any disadvantage is concerned, it is argued that in sparsely settled areas there is little, if any, stability of land uses, so that the advantage of the floating zone may be obtained there without any serious adverse effect.

The Regional Planning Association of New York now takes the position with respect to such projects that "(t)he use of the floating zone is most appropriate perhaps . . . when the municipal-

⁷¹ *Id.* at 88, 186 A.2d at 165.

ity is lightly settled.”⁷² In this connection, the Association pinpointed shopping centers as an example, noting:

“Floating zones are created to provide for certain uses which eventually will be needed in the municipality but for which specific locations cannot reasonably be determined in advance. They are held to be useful in providing for future large-scale uses (for instance, shopping centers) when the municipality is not yet ready to single out a particular tract of land for the use.”⁷³

The American Society of Planning Officials seems also to have relaxed its opposition to the floating zone concept in the case of large-scale shopping center developments in suburban areas. They observe that in fringe areas the zoning map does not represent a stabilized situation, and that this type of ordinance seems “administratively feasible” for shopping centers although not the “best practice” from a theoretical standpoint.”⁷⁴

The Tulsa Metropolitan Area Planning Commission in its 1959 forecast of “1975 Metropolitan Tulsa Commercial Land Needs” recommended action to “incorporate the floating zone principle in the revision of the Zoning Ordinance”⁷⁵ after pointing out the following advantage of this device for shopping centers:

“Use of floating zones encourages competition among property owners. For example, where there is more than one site proposed in the same general location and each is equally appropriate for a needed shopping center, the competitive effect of utilizing the floating zone (rather than favoring one site with a mapped district) prevents an undue inflation of the cost of acquiring the site for actual development.”⁷⁶

Research has not disclosed any case in the State of Oklahoma involving the floating zone concept. The enabling legislation of that state provides that by zoning regulations “(t)he local legislative body may divide the municipality into districts of such number, shape and area as may be deemed best to carry out the purposes of this Act,”⁷⁷ and mandates that such regulations “shall be in accordance with a comprehensive plan.”⁷⁸ Identical language appeared in the Standard Zoning Enabling Act recommended by the U. S. Department of Commerce in 1926. The Model Standard Act, with the particular requirement of conformity with a comprehensive

⁷² Regional Planning Ass’n, *Zoning Advances in the New Jersey-New York-Connecticut Metropolitan Area*, 1956.

⁷³ *Ibid.*

⁷⁴ Planning Advisory Service, *Information Report American Soc’y of Planning Officials*, No. 128, p. 22, Nov. 1959.

⁷⁵ 1975 Metropolitan Tulsa Commercial Land Needs, p. 95 (1959).

⁷⁶ *Id.* at 92.

⁷⁷ 11 OKLA. STAT. § 402 (1961).

⁷⁸ 11 OKLA. STAT. § 403 (1961).

plan, has been adopted, often literally, by most states.⁷⁹

If the recommendation of the Tulsa Metropolitan Area Planning Commission were implemented for shopping center development, such use of the floating zone would find support from professional planners in various parts of the country. However, under the present wording of the state enabling legislation, the legality of any such ordinance would depend on the approach taken by the Oklahoma courts. The courts could choose the logical and persuasive rationale of Pennsylvania's *Eves* case where a floating zone ordinance was invalidated. To the contrary, there is the much criticized reasoning of the majority of the New York court in the *Tarrytown* case, upholding such legislation after noting that "simply a garden apartment development"⁸⁰ was involved. Also to the contrary is Pennsylvania's recent *Donahue* case where the entire question was obscured rather than clarified.

Indeed, a potent argument for rejecting the majority ruling of the *Tarrytown* case, even though application of the floating zone to shopping center development may be desirable, is found in the dissenting opinion in that case: "[Z]oning methods are determined by the Legislature and not by the ingenuity of local boards of trustees or by the courts. In short, we think the end cannot here justify the means used."⁸¹ Substantially to the same effect as the above minority view was the dissent in the *Huff* case. Despite the worthy objective of the application there involved, namely the relocation of a defense plant to a rural area in accordance with governmental requirements for decentralization of such establishments, the minority of the Maryland Court of Appeals pointed out:

"[T]erritorial distribution of uses, in accordance with a comprehensive plan, seems to have gone by the board. I think such a scheme is *ultra vires* and beyond the scope of the enabling act. If such a departure from accepted tenets is required by modern conditions, as contended, it should be brought about by change in the basic law."⁸²

Accordingly, without any legislative change in the Standard Zoning Enabling Act, and in the absence of rulings by the courts, the legal status of the floating zone concept would appear to be uncertain.

APPLICABILITY TO GASOLINE SERVICE STATIONS

The extension of the floating zone principle to gasoline service stations is demonstrated by a recent amendment enacted by the Town of Brookhaven, Long Island, New York. By the basic ordi-

⁷⁹ 8 McQUILLIN, MUNICIPAL CORPORATION § 25.49 (3d ed. 1949); 1 RATHKOPF, THE LAW AND PLANNING, §§ 3-2, 9-1 & vol. 2, §§ 100-1 to 100-6.

⁸⁰ 302 N.Y. at 126, 96 N.E.2d at 736.

⁸¹ *Id.* at 130, 96 N.E.2d at 738.

⁸² 214 Md. at 68, 133 A.2d at 94, 95.

nance of that town, its land was divided into conventional zoning districts: several residence districts, several business districts, and industrial districts. Prior to the amendment, gasoline service stations were permitted as of right in light and heavy industrial districts⁸³ and, when authorized by special permit of the Board of Appeals, in H and J-1 business districts.⁸⁴ The authority of the Board of Appeals to grant special permits for gasoline service stations was qualified by certain safeguards as to required pump setbacks, restrictions on repair work, etc.

On July 15, 1963, the Town Board adopted an amendment dealing solely with gasoline service stations.⁸⁵ This use is no longer permitted as of right in either of the industrial districts. The amendment has also eliminated from the basic ordinance the power of the Board of Appeals to grant special permits for service stations in H and J-1 business districts. Accordingly, this administrative agency no longer has any control of special permits for service stations in any zoning district of the town.

For the establishment of service stations exclusively, the amendment added a "J Business 5 District" classification, designated "Gasoline Filling Station District."⁸⁶ The expressed intent of the new classification is "to provide adequate safeguards for the location and siting of gasoline filling stations."⁸⁷ The amendment contains restrictions on repair work and requirements by way of pump setbacks, front, side, and rear yards, curb cuts, screening, etc. The boundaries of the new classification were not fixed in any way, leaving for future determination the areas to be eventually classified in that zone. For its implementation, the amendment provides a procedure by way of rezoning application to the Town Board.⁸⁸ However, as of the time of the submission of this article, no property has been rezoned to the new classification.

Particularly noteworthy in the Brookhaven amendment is the minimum area requirement of 20,000 square feet⁸⁹—less than one-half acre. The legislation which was invalidated in the *Eves* case prescribed a minimum area of 25 acres—more than fifty times the Brookhaven requirement. That case involved a rather large tract, 86 acres, but the court was apprehensive of the flexible selective zoning principle "for in theory it allows the piecemeal placement of relatively small acreage areas in differently zoned districts."⁹⁰ This zoning concept, it was held, "carries evils akin to 'spot zon-

⁸³ BROOKHAVEN, N. Y., BUILDING ZONE ORDINANCE §§ 1300, 1330.

⁸⁴ BROOKHAVEN, N. Y., BUILDING ZONE ORDINANCE §§ 1000(c) (4), 1100(c) (7).

⁸⁵ The Long Island Advance, July 25, 1963.

⁸⁶ BROOKHAVEN, N. Y., BUILDING ZONE ORDINANCE art XI-D added, July 15, 1963.

⁸⁷ BROOKHAVEN, N. Y., BUILDING ZONE ORDINANCE § 1190.

⁸⁸ BROOKHAVEN, N. Y., BUILDING ZONE ORDINANCE § 1198B.

⁸⁹ BROOKHAVEN, N. Y., BUILDING ZONE ORDINANCE § 1194.

⁹⁰ 401 Pa. at 218, 164 A.2d at 11.

ing"⁹¹ such as opportunity for favoritism, lack of notice to property owners, and the absence of standard court review. The application of the floating zone to small acreage areas is precisely what the Pennsylvania court feared in *Eves*. Surely this criticism of the concept is even more in point when an area of less than one-half acre is involved, as in the case of the Brookhaven amendment.

A recent spot zoning case in Pennsylvania, where the size of the area was considered to be an important factor, is that of *In Re Glorioso's Appeal*⁹² which was decided in January, 1964. This case did not deal either with the floating zone concept or with rezoning, but rather with a portion of a basic zoning ordinance. The *Glorioso* spot zoning was somewhat of an unusual type. Spot zoning usually benefits the subject property by tending to increase its value. In this instance, the ordinance tended to diminish the value of the property involved. Appellant applied to the Board of Adjustment of the Borough of Verona for a variance permitting the construction of a gasoline service station in a district which was zoned "Special" for governmental, public, and quasi-public uses. The entire district encompassed only about four and one-half acres which was described by the court as "a minute area of the borough."⁹³ The district consisted solely of three properties, one of which was owned by appellant. The ordinance specifically prohibited a gasoline service station in this "Special" district, and further prohibited the Board of Appeals from permitting in such district any use other than those allowed. In view of these limitations, the Board of Appeals decided it lacked authority to grant the variance. The lower court agreed with this position and dismissed the appeal. However, the Pennsylvania Supreme Court reversed the order of dismissal, holding that the ordinance, insofar as it created the "Special" district, was illegal spot zoning. The court said:

"By the creation of this 'Special' district in this small area of land, completely surrounded by districts zoned commercial and industrial, the Borough has singled out and created a small 'island' of severely restricted uses, despite the absence of any differentiating relevant facts between the 'island' and the surrounding districts."⁹⁴

The invalidated portion of the Verona ordinance created only one "small 'island'"⁹⁵ by setting up a district of approximately four and one-half acres with only three properties. Under the Brookhaven amendment, there may be sprinkled throughout the town many "small 'island(s)'"⁹⁶ of gasoline service stations, each comprising less than one-half acre, and each consisting of only one property — the service station.

⁹¹ *Ibid.*

⁹² 413 Pa. 194, 196 A.2d 668 (1964).

⁹³ *Id.* at 199, 196 A.2d at 672.

⁹⁴ *Id.* at 200, 196 A.2d at 672.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

The *Tarrytown* ordinance, as well as the Whitemarsh Township ordinance in *Donahue*⁹⁷ prescribed a minimum area of as much as ten acres—more than twenty times the Brookhaven requirement. Area size was a basis for distinguishing the *Tarrytown* case in *Santmyers v. Town of Oyster Bay*⁹⁸ where an 18,000 square foot parcel was rezoned for a gasoline service station. Although the floating zone concept was not involved in the latter case, the related question of conformity with a comprehensive plan was considered. Declaring the rezoning unconstitutional, the court, per Christ, J., held that the Oyster Bay ordinance was not “in furtherance of any comprehensive plan” and constituted spot zoning. *Tarrytown*, it was pointed out, “involved a ten-acre parcel of land. It was for apartment homes”⁹⁹

Advocates of the floating zone principle argue that its flexibility is administratively desirable, from a planning standpoint, for locating shopping centers. It may well be that such a different zoning method is appropriate for this relatively new type of facility which has resulted from our changing pattern of living, particularly changes in our retail shopping habits. But the considerations involved in the case of the shopping center do not apply to the service station because:

(1) The shopping center occupies a large area while the service station site is usually less than one-half acre.

(2) The shopping center is comparatively rare; the service station is a common facility.

(3) The shopping center is usually set up in sparsely developed areas and, by attracting thousands of patrons, generates heavy traffic at busy times; the service station is located in developed areas where traffic already exists.

(4) The shopping center usually determines the subsequent development of the surrounding area; the service station location is determined by the development which it follows.¹⁰⁰

(5) The shopping center may present problems as to prediction of the site; the service station presents no such problem.

Inherent in the floating zone idea is another consideration which furnishes a potent argument against the application of this device to the service station type of use. Since the concept contemplates only one land use, employment of such technique restricts or freezes the subject property to that one use. But the conditions which zoning is to meet are not static. In the course of time, it may become uneconomic or undesirable to continue the

⁹⁷ *Supra*, note 50, at p. 17a.

⁹⁸ 10 Misc.2d 614, 169 N.Y.S.2d 959 (Sup. Ct. 1957).

⁹⁹ *Id.* at 616, 169 N.Y.S.2d at 961.

¹⁰⁰ The American Society of Planning Officials has pointed out: “Generally speaking, service stations are not constructed in new and growing areas until development reaches a point where the business potential of the area can be estimated accurately.” American Society of Planning Officials, Planning Advisory Service, Information Report No. 140, p. 8, Nov. 1960.

service station use because of a neighborhood change, road widening, etc. Under any of these circumstances, the property owner would not be entitled to any other use as a matter of right or by way of a special exception, but would be compelled to seek another rezoning amendment. On the other hand, where a service station is established through the means of the conventional special exception, the existing zone classification permits of other conforming uses. This distinction is academic in the case of a large-scale project such as a shopping center or multiple apartment development, where there is little possibility of changing conditions shortening the useful life of the project. However, in the case of the service station it is a very real, practical consideration, and one deserving concern since zoning should be designed to serve not only the present, but also the long range needs of the future.

Recent authority rejecting the restrictive notion of single use zoning is found in *Pierson Trapp Company v. Peak*.¹⁰¹ That case involved a portion of a zoning resolution which prescribed a procedure for shopping centers, so as to "rezone the property to the classification permitting the proposed center."¹⁰² This provision was viewed by the Court of Appeals of Kentucky as tantamount to one establishing a specific shopping center classification. In this connection, the court pointed out that the wording of the enabling legislation authorizing the establishment of zones or districts meant "zones or districts based upon *classes of uses*."¹⁰³ It was held, therefore, that the zoning resolution was unconstitutional to the extent that it required that the rezoning restrict the property to a particular use. Said the court:

"Nowhere in the field of zoning law do we find any indication that the zoning authority may establish a zone or district that is limited to only one particular use. Our concept of the legitimate scope of the zoning power does not extend it to the point of embracing the power to restrict the use of property other than to reasonable general classifications."¹⁰⁴

It would appear to be unrealistic to hold that a shopping center, with all the different types of stores it encompasses, is not in fact a general classification for zoning purposes. In any event, the Kentucky court's broad-scale disapproval of single use zoning is particularly appropriate when applied to the gasoline service station type of use.

For all of the above reasons, it is submitted that the application of the floating zone concept to the gasoline service station use is contrary to sound legal and planning principles.

¹⁰¹ 340 S.W.2d 456 (Ky. 1960)

¹⁰² *Id.* at 459.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

CONCLUSION

Prior to zoning legislation, land use control in this country was generally accomplished by the law of nuisance and restrictive covenants. However, neither of these controls was sufficiently satisfactory, chiefly because they both depended upon private initiative for their operation. Since early in this century, zoning regulations have removed this limitation by placing initiative in the hands of the local legislature. The success of this kind of land use control is well attested by the widespread adoption of such zoning ordinances throughout the country. It may well be that large-scale developments of today and tomorrow need a different type of control than the one that now prevails. Nevertheless, the traditional concepts which have become deeply imbedded in our zoning ordinances should not be discarded by our courts. Our judiciary is not the proper governmental unit to shape or promulgate a philosophy of land use control. Nor should such a philosophy be developed on a piecemeal, case by case basis. Herein lies a long-pending opportunity for our state legislatures. What is needed is a legislative definition, on an overall basis, of the term "comprehensive plan". Also needed is a legislative determination of the place in our scheme of land use control of the new approach of the floating zone which is predicated on private rather than governmental initiative.

It is apparent from the cases discussed that the courts of several jurisdictions are in sharp conflict on the legality of the floating zone concept or that of the so-called "floating use". Such conflict arises from different judicial interpretations of the phrase "in accordance with a comprehensive plan" as contained in most state enabling acts. It also appears that some planning experts, while opposed to the principle of the floating zone and to its arbitrary application, now recommend its implementation in the case of large-scale developments such as shopping centers.

The conflict in judicial authority would be best resolved by amendment of state enabling legislation so as to accommodate the concept of the floating zone. However, it is submitted that such accommodation should be very strictly and carefully limited to large-scale developments of the shopping-center type, where implementation of the floating zone concept may be gainful. As to other types of uses, including that of the gasoline service station, the conventional zoning pattern has prevailed successfully for many years. It affords sufficient flexibility, maintains adequate safeguards for court review of variances and special exceptions, and preserves stability in land uses and property investments which zoning originally sought to protect. As to such other uses, state enabling legislation should be clarified so as to avoid possible departure from our traditional zoning pattern by way of the floating zone concept.

